

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE**

**DEER CREEK ELECTRIC, INC. and
BLACK HILLS ELECTRIC, INC., alter egos**

and

Case 19-CA-097260

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 76,
AFL-CIO, CLC**

Ann Marie Skov, Esq., counsel for the General Counsel
William T. Grimm, Esq., counsel for Respondents
Clint Bryson, Business Manager, for the Charging Party

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge: The issue in this case is whether electrical contractor Black Hills Electric, Inc. (BHE) is a disguised continuance, that is, an alter ego, of electrical contractor Deer Creek Electric, Inc. (DCE) and thus has an obligation to bargain with International Brotherhood of Electrical Workers, Local 76, AFL-CIO, CLC (the Union), the exclusive bargaining representative of DCE's electrical employees.¹ I find insufficient evidence to support alter ego status and recommend dismissal of the complaint.

On the entire record,² including my observation of the demeanor of the witnesses,³ and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondents, I make the following findings of fact and conclusions of law.

¹ The Union filed the underlying unfair labor practice charge on January 25, 2013. Complaint and notice of hearing issued May 29, 2013. Hearing was held in Seattle, Washington on February 11 and 12, 2014, and was closed telephonically on February 27, 2014.

² The General Counsel's unopposed motion to correct the transcript and certain General Counsel exhibits is granted.

³ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

FINDINGS OF FACT

I. Jurisdiction and Labor Organization Status

From about 2003 or 2004 through December 2012, when it ceased doing business, DCE, a Washington corporation located in Tumwater, Washington, was an electrical contractor in the construction industry. Since October 1, 2012, BHE, a Washington corporation located in Tumwater, Washington, performs electrical work in the construction industry. DCE and BHE (jointly Respondents) admit and I find that they meet the Board’s non-retail direct inflow standard⁴ and are employers within the meaning of Section 2(2), (6), and (7) of the Act. Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. Collective-Bargaining Relationship Between DCE and the Union

The Southwest Washington Chapter of the National Electrical Contractors Association, Inc. (NECA) is an organization composed of various employers in the construction industry. One purpose of NECA is to represent employer members in negotiating and administering collective-bargaining agreements with the Union. On February 5, 2004, DCE signed a letter of assent–A for the residential wireman’s labor agreement between NECA and the Union and a letter of assent–A for the commercial inside wireman’s labor agreement between NECA and the Union. Both of these documents stated that they bound DCE to current and subsequent “approved labor agreements” absent timely notice of withdrawal.

On that same date, DCE signed a recognition agreement “executed pursuant to Section 9” of the NLRA recognizing the Union based on a card check. The following unit of employees is set forth in the 2004 recognition agreement:

All journeymen, apprentice and helper electricians (Electricians) employed by [DCE] within the Union’s territorial jurisdiction, excluding office clerical, professional, managerial employees, guards and supervisors as defined by the Act.

Respondents deny that this unit is appropriate for bargaining within the meaning of Section 9(b) of the Act and deny that DCE recognized the Union as the exclusive collective-bargaining representative of the unit. No evidence was offered to counter the signature on the recognition agreement. No evidence was offered to show inappropriateness of the historical unit.⁵ Thus, I find recognition of a unit appropriate within the meaning of Section 9(b) of the Act.

⁴ *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

⁵ Change in ownership does not destroy bargaining units that have an established history of collective bargaining unless the units no longer conform to other standards of appropriateness. *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994) (citing *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988), *enfd.* 84 F.3d 637 (2d Cir. 1996)).

Moreover, the record clearly reveals that DCE was signatory not only to the recognition agreement but also to various letters of assent and letters of agreement binding it to the terms of the 2009–2012 and 2012–2015 NECA/IBEW agreements. DCE signed September 2009 letters of assent and agreement which bound DCE to the current and subsequently approved construction
 5 inside wireman’s IBEW/NECA labor agreements absent timely withdrawal. Thus, the September 2009 letter of agreement committed DCE to the IBEW/NECA contract for a 1-year period from September 1, 2009 through August 31, 2010. Failure to terminate at that time committed DCE to the contract until its duration date of August 31, 2012.

10 Subsequently, DCE signed an identical construction inside wireman’s letter of agreement on August 31, 2010, and again in August 2011. By the terms of these agreements, failure to timely terminate bound DCE to subsequent labor agreements “until the stated duration date of August 31, 2012, as well as to all subsequent amendments and renewals.” There is no evidence
 15 of timely notice of intent to withdraw. Absent such notice, the automatic rollover provision bound DCE to the July 1, 2012-August 31, 2015 IBEW/NECA agreement. Thus, I find that since 2004, DCE and the Union had a collective-bargaining relationship and that the Union was the exclusive collective-bargaining representative of the unit employees based on Section 9(a) of the Act.

20 **III. Deer Creek Electric**

Richard and Sandra Moloney, husband and wife, owned 51 percent and 49 percent respectively or 100 percent jointly, of DCE, a licensed electrical contractor. Other than ownership, Sandra Moloney did not take an active role in the company. DCE was in existence
 25 from roughly 2003 or 2004 until December 31, 2012.⁶

DCE was certified in the industry as a service-disabled-veteran-owned company. This allowed DCE to bid on work set aside for disabled veterans. Moloney testified that the bulk of DCE’s work was public works jobs bid both through regular bidding and through disabled
 30 veteran set-aside bidding. DCE was not involved in “design build work,” that is, designing and then building the electrical system. DCE did not perform any data networking jobs, that is, work involving mobile cabling for voice, phone, and computers. During 2012, it subcontracted data networking jobs to Communications Technologies, Inc. (CTI) owned by Wes Hillman.

35 DCE’s office was located at the Moloney’s residence, 2920 70th Avenue Southwest, Tumwater, Washington. No shop was located at the residence. However, a 40-foot container and a pipe rack, both on the property, were used for storage of electrical items. A shop facility was located on an adjacent property. Richard Moloney (Moloney) was the president, treasurer,
 40 general manager, and supervisor of DCE’s projects. He handled finances including payroll, accounts receivable and payable, and had the final decision-making authority regarding financial issues. He also estimated the cost of performing jobs, submitted bids for jobs based on his estimates, and signed contracts to perform work. He did not work in the field with tools. Moloney served as the electrical administrator for DCE and in that capacity was responsible for
 45 assuring that the operations were run safely.

⁶ DCE was first formed as a sole proprietorship. One year after formation, it was incorporated.

DCE performed a substantial amount of city, state, and federal public works jobs. Moloney submitted bids for these jobs and completed affidavits certifying that prevailing wages were paid on those jobs.

5 DCE had an agreement with Consolidated Electrical Distributors, Inc., an electrical supplier, for credit sales on an open account. Platt Electric is listed as one of three credit references. DCE used Stapp Financial as its accounting firm and Capital Bookkeeping Solutions for bookkeeping. DCE utilized the services of subcontractor CTI to perform data work on several occasions during 2010 (\$6205), 2011 (\$11,605), and 2012 (\$9857).

10 In 2009, DCE considered withdrawing recognition of the Union. By letter of March 26, 2009, DCE stated it was withdrawing due to current economic conditions. In July, DCE contacted the IBEW Pacific Coast Pension Fund notifying it of withdrawal from the Union. Nevertheless, on September 1, 2009, DCE signed a construction inside wiremen's letter of assent and a construction inside wiremen's letter of agreement.⁷

20 Due to the recession, fewer public works opportunities, and underbidding on those public works jobs which did exist, DCE was losing money during 2011 and 2012. DCE set up a website in November 2011 in order to attract further business. Moloney described this as a "last-ditch effort to try to get things going a little bit better." According to the website maintained by DCE from November 2011 through December 2012, DCE performed residential and wiring repair and upgrade; commercial, residential and industrial wiring; appliance and lighting installation; and generator installation. A wider range of electrical services was also listed at the end of the site and included computer and data wiring.

25 The Moloneys personally assumed the 2011-2012 debt of a little over \$60,000. Beginning September 30, 2012, DCE ceased business and ceased employing Pete Buck and Jesse Birdsall. Other employees of DCE included Troyep Aly. DCE's doors closed officially on December 31, 2012. The website was also taken down in December 2012. It had produced no new business during the time of its existence.

30 In general, according to Union Business Manager Dennis Callies, Moloney expressed dissatisfaction with the quality of help he received from the Union's hiring hall. According to Callies, Moloney made this complaint every 2-5 months and opined to Callies that the Union was not a good fit for DCE. These conversations occurred over the course of time but specifically in 2012.

35 On August 30, 2012, DCE signed an IBEW/NECA employee termination notice for journeyman Jesse Birdsall stating the reason for termination as "Closing Shop." The following day, DCE submitted an identical form for Pete Buck stating the reason for termination as "Closing Company." Birdsall and Buck were the only employees of DCE at the time it closed. By letter of September 7, 2012, the Union advised DCE that its notice of termination was

45 ⁷ In December 2009, the IBEW Pacific Coast Pension Fund assessed unfunded pension liability of \$331,069 due to DCE's withdrawal from the Union. Three days later, the fund rescinded this assessment in light of the September 2009 letters of assent and agreement.

untimely and that the Union viewed DCE as bound to the successor agreement. Shortly thereafter, DCE sent a letter to the Union stating, “As of Oct. 1st 2012 Deer Creek Electric Inc. will no longer be performing electrical work. We will close the company on Dec. 31st 2012.” As stated in the letter, all operations of DCE ceased in September 2012. DCE was permanently closed December 2012.

IV. Black Hills Electric

BHE is an electrical company located in Tumwater, Washington owned 100 percent by Cheri Jackson, Sandra Moloney’s sister. During the months of June to August 2012, Jackson and Moloney began serious discussions about her desire to open her own company. At some point during this time, Jackson asked Moloney if he would help her “if . . . she opened a company if I’d help her run it and teach her.” Moloney told Jackson he was:

having a hard time in the markets I was in because of the way people were bidding them and the economy and there wasn’t as much money being spent by the government. I suggested she do design build data networking . . . and residential.

Although Jackson works full time at the Washington State Gambling Commission, she began setting up her company, BHE, in October 2012. At the time of hearing, Jackson was still employed with the Washington State Gambling Commission.

Taking Moloney’s advice to emphasize different sectors of the electrical industry than those he was in, Jackson targeted design build, data networking, and residential electrical work for BHE. Jackson was never employed by DCE.

As the owner of BHE, Jackson oversees the company, handles finances, accounts payable and receivable, payroll, and personnel. She also reviews bids. Jackson hired Moloney, Wes Hillman, Jesse Birdsall, and Paul Roulet. Both Birdsall and Roulet are hourly electricians. By January 2013, BHE also employed Derrick Lancaster and Brian Connelly. In the spring two other employees, Joshua Duncan and Jordan Beers, were brought on board.

Jackson purchased equipment and vehicles for BHE. Jackson, on behalf of BHE, leased property located at 9248 Blue Mountain Lane, Suite A, in Tumwater. BHE has not recognized the Union and does not pay into the Union benefit funds. BHE employs one journeyman electrician, Jesse Birdsall.

Moloney is the general manager, project manager, electrical administrator,⁸ and estimator for BHE. He supervises some but not all of the projects. Moloney applies for permits for electrical work and files affidavits for public works projects certifying payment of prevailing wages. He described his work:

⁸ Moloney testified that he has the same electrical administrator license at BHE that he had at DCE because the license number is specific to the person holding the license rather than to the particular company employing that person. I credit this testimony.

I try to find work to bid on, meet with customers, check and make sure the materials and stuff are getting bought at right prices, try to make the jobs come in and make money and go out and meet with guys in the field and . . . I go out and actually work with them too and try to make sure we're profitable.

Moloney estimated he worked in the field 2 to 3 days a week. Moloney certifies prevailing wage on public projects and Jackson provides the certified payrolls for public projects. Moloney explained that he provides the wage certification because that information comes from the project management documents while Jackson handles the certified payroll because she handles the payroll documents. BHE does not qualify to bid on any veteran set-aside projects because the owner, Jackson, is not a veteran.

The third member of BHE's management team is telecom manager Wes Hillman who handles data networking, low voltage side. He finds and bids that work, manages those projects, and installs on the projects. Hillman and Jackson began talking about his coming on at BHE in November and December 2012. Hired in January 2013, Hillman began working part time (about 15–20 hours per week) for BHE in February 2013. At that time he was also running his own company, CTI. CTI worked for DCE as a subcontractor. In August 2013, Hillman became full time at BHE.

Besides these three managers, at the time of hearing there were four hourly paid employees including former DCE employee Jesse Birdsall. BHE has performed 17 data jobs from January 2013 through February 2014. Jackson hired hourly employee Josh Duncan in 2013. One of the data jobs, cabling all classrooms in 10 schools, was partially subcontracted for 7 of the 10 schools.

From January 2011 through December 2012, a 24-month period, DCE had about 168 projects for 61 customers with total sales of a little over \$1 million. From October 2012 through January 22, 2014, a 16-month period, BHE had about 240 transactions for 80 customers with total sales of about \$1,235,000. Out of these totals, 21 customers of DCE became customers of BHE. DCE performed 85 projects, or 51 percent of its projects, for these customers in common from January 2011 through December 2012 and total sales during that period for these 21 customers in common were roughly \$655,000, or 60 percent of total sales. Subsequently, BHE performed 68 transactions for these customers in common, or 28 percent of its transactions, and total sales for these customers in common during the period October 2012 through January 22, 2014, were around \$365,000 or 30 percent of sales.

On October 10, 2012, Moloney signed a memorandum on behalf of DCE which gifted BHE 5 vehicles: a 2005 Ford F-150, a 2006 Ford E-150, a 1972 T-Weld, a 1984 International, and a 1994 Dodge Ram van. A vehicle title application/registration certificate dated October 10, 2012, indicates that BHE has title to the 2005 Ford previously owned by DCE. The certificate is signed by Moloney as general manager and no sales tax is reflected which indicates that it was a gift.

However, later tax documents reflect that the two Ford vehicles were sold by DCE to BHE for \$2500 (2005 Ford F150) and \$3500 (2006 E-150 van). BHE paid sales tax on these vehicles in February 2013. An October 2012 bill of sale also indicates that the 1994 Dodge Ram

van was sold to BHE for a purchase price of \$500. The three vehicles sold to BHE represented three of the six licensed vehicles owned by DCE. The other two vehicles listed in the gift memorandum are still owned by Moloney.

5 A memorandum indicates that various tools were sold by DCE to BHE including four ladders, two drills, a saw, and assorted hand tools. The total price for the three vehicles and tools sold by DCE to BHE, \$7995, was paid off from January 17 to December 1, 2013. The tools represented some but not all of DCE's tools. Moloney testified that he fixed the prices for the vehicles and tools by consulting with his accountant about depreciated items and looking at fair
10 market value. He also went to auction websites to look for comparable sales in the construction industry. In addition to the three vehicles purchased from DCE, BHE also purchased a 2003 Dodge Ram van from Ranier Dodge in April 2013 and a 2006 Chevy Van from the Goodguys in December 2013. In addition to purchasing tools from DCE, BHE has also purchased tools from Craigslist, state surplus, Platt Electric, and Travis Cox, an individual who sells refurbished
15 laptops.

Moloney examined the records of BHE in preparation for this hearing. By his count, BHE has had 82 customers since its opening until this hearing in February 2014. He concluded that of a total of 161 jobs performed, 131 were private while 29 were public works. He found 21
20 customers in common with DCE out of a total of 82 total customers of BHE. Additionally, BHE has performed 17 data jobs while DCE did not perform any data jobs.⁹ Moloney's testimony comports with DCE's account documents and I credit it.

By purchase order of October 1, 2012, BHE agreed to complete and assume all
25 responsibility for work previously performed by DCE for Evergreen Fire and Security. This was the only job that BHE was called in to complete after DCE worked on it and went out of business.

Like DCE, BHE has an open account agreement with Consolidated Electrical
30 Distributors, Inc. for credit sales on an open account. Platt Electric is listed as the sole credit reference. Both Jackson and Moloney signed the personal guaranty for credit sales. Moloney testified that Consolidated wanted a second name because Jackson was new to the industry.

BHE subcontracts with Centennial Contractors Enterprises, Inc. at joint base Lewis-McCord as did DCE. One project, which was in progress when DCE ceased operations, was later
35 awarded to BHE. Moloney thought that the work lapsed for a time and after DCE ceased operations, BHE performed work for Centennial—whether completing the project or for a separate project he could not be sure. As he recalled, DCE performed a fire alarm job in the summer of 2012 and BHE performed some punch list additions¹⁰ on it in January 2013.

40 BHE utilized the bookkeeping services of Capital Bookkeeping from January 31 through November 5, 2013. In addition, Capital Bookkeeping provided teaching assistance to Jackson to

⁹ Moloney explained that DCE did not have the expertise to handle data jobs so it subcontracted the four data jobs that it handled.
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¹⁰ Moloney gave examples of punch list items: "This needs a plate on the wall. This is crooked. Fix this. Change a light."

use Quick Books. In November 2013, BHE quit using Capital to handle bookkeeping and Jackson took over that function on her own. BHE employed Stapp Accounting Services beginning in November 2013.

V. Union Investigation

In October 2012, Clint Bryson, business manager for the Union, was asked to look into BHE. He discovered that Moloney’s administrator’s license had been reassigned from DCE to BHE. Bryson also discovered that Jesse Birdsall, who had worked for DCE, was employed by BHE. Bryson also concluded that the two businesses were substantially the same. He learned that BHE was located on Swecker Avenue,¹¹ a different address than DCE. However, when he visited this location in December 2012, there was no observable electrical business taking place. On the other hand, when he drove to the address for DCE, he observed a storage container as well as a van, a pickup truck, and electrical equipment. While he was there, an older Dodge van arrived. Later, Bryson spotted the same van at Jesse Birdsall’s address. Both vehicles had BHE’s label on them.

By certified mail of December 10, 2012, the Union alerted BHE that it believed it was an alter ego of DCE. On behalf of DCE, Moloney responded claiming no alter ego relationship existed. Moloney completed the questionnaire as to DCE only. Jackson responded on behalf of BHE stating that Moloney was managing BHE but has no ownership interest in the company. Jackson denied alter ego status between Respondents

VI. Analysis

A change in corporate form that involves no more than a “technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management” may be disregarded and the alter ego “is subject to all of the legal and contractual obligations of the predecessor.” *Howard Johnson Co. v. Hotel & Restaurant Employees Detroit Local Joint Executive Board*, 417 U.S. 249, 259 fn. 5 (1974). The determination of alter ego status is a question of fact based on all attendant circumstances. *Southport Petroleum v. NLRB*, 315 U.S. 100, 106 (1942).

Ownership, management and supervision, business purpose, operations, equipment, and customers are the typical factors determinative of whether alter ego status exists. *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976). If these factors are substantially identical, an alter ego relationship will ordinarily be found. *Id.*

Moreover, while substantial identity of ownership is an important factor, alter ego status may nevertheless be found absent common ownership

only where both companies are either totally owned by members of the same family or nearly totally owned by the same individual or where the older company

¹¹ Apparently the address Bryson was given was Jackson’s home address. There is no evidence that Jackson’s home was ever utilized for BHE.

continued to maintain substantial control over the business claimed to have been sold to the new company.

Superior Export Packing Co., 284 NLRB 1169, 1170 (1987), enfd. mem sub nom. *Meadowlands Hy-Pro Industries v. NLRB*, 845 F.2d 1013 (3d Cir. 1988)(Table). Absent those circumstances, the lack of substantially identical common ownership precludes a finding of alter ego status. *Id.*

A further consideration is whether the purpose behind creation of an alleged alter ego was legitimate or was to evade responsibilities under the Act.¹² Not all factors are necessary to an alter ego finding and no single factor is determinative,¹³ that is, if the second company was created in order to allow the first company to evade its responsibilities under the Act.¹⁴

Absence of Substantially Identical Ownership

The record establishes that DCE and BHE are owned by members of the same family. DCE was owned by Richard and Sandra Moloney while BHE's owner is Sandra Moloney's sister, Cheri Jackson. Were familial identity of ownership alone the determinative factor, a finding of substantially identical ownership might be warranted. See, e.g. *Walton Mirror Works*, 313 NLRB 1279, 1284 (1994)(substantially identical ownership established where owners of two alleged alter egos were brothers-in-law). The inquiry does not end in recitation of family relationship, however. The fact of family relationship merely gives rise to an inference of common financial control. *US Reinforcing, Inc.*, 350 NLRB 404, 406 (2007).

In this case, Sandra Moloney did not take an active role in the operations of DCE. Her husband had sole financial control of DCE. Sandra Moloney's sister has sole financial control of BHE. In *US Reinforcing, Inc.*, supra, the Board stated that "the inquiry at the heart of the 'close familial relationship' inference concerns the degree of *financial control* the owner of one company has over the other company." The Board quoted as follows from *First Class Maintenance*, 289 NLRB 484, 485 (1988):

[A] finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owners of two companies. Rather, each case must be examined in the light of all the surrounding circumstances. In particular, the Board focuses on whether the owners of one company retained financial control over the operations of the other. [Internal citations omitted.]

Thus, in *US Reinforcing*, the Board held that close familial relationship will support a finding of substantially identical ownership only when the owners of one alleged alter ego

¹² *US Reinforcing, Inc.*, 350 NLRB 404, 404 (2007)(citing *Liberty Source W*, 344 NLRB 1127, 1136 (2005), quoting *Fallon-Williams, Inc.*, 336 NLRB 602, 602 (2001)).

¹³ *Id.*, citing *Liberty Source W*, supra, 344 NLRB at 1136; *Standard Commercial Cartage*, 330 NLRB 11, 13 (1999); *MIS, Inc.*, 289 NLRB 491, 492 (1988).

¹⁴ *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 8 (2007)

“exercise considerable financial control” over the other alleged alter ego.”¹⁵ The Board found no substantially identical ownership due to an absence of evidence that the owner of one alleged alter ego retained any financial control over the owner of the second alleged alter ego, owned by his live-in girlfriend, although the two were a “committed couple.”¹⁶

The same conclusion applies here. There is no evidence that Moloney has any financial control over BHE even though he is actively involved in its operations.¹⁷ Further, there is no evidence that Moloney shares in the profits of BHE. Accordingly, I conclude that substantial identity of ownership has not been established.

Absence of substantially identical ownership is an important factor militating against a finding of alter ego relationship.¹⁸ However, other factors must also be examined.

Absence of Evidence Indicating a Purpose to Evade Responsibilities under the Act

In 2009, Moloney attempted to withdraw from the Union and then changed his mind. The record does not reflect why he changed his mind. An assessment of unfunded pension liability was not sent to him until after he executed new letters of assent and agreement. The unrebutted testimony of Union Business Manager Callies, which I credit, indicates that Moloney was clearly unhappy with the quality of employees sent to him by the Union in 2012 and did not think the Union was a “good fit” for DCE. However, there is no evidence that Moloney’s decision to cease doing business in 2012, 3 years after his attempt to withdraw, was due to this unhappiness with the Union. Rather, the record reflects economic reasons for DCE’s cessation of business. Further, there is no evidence that Jackson’s decision to form BHE was orchestrated as an attempt to assist Moloney in ridding himself of the Union. Under these circumstances, I find an absence of a purpose to evade responsibilities under the Act.¹⁹

¹⁵ Citing *Adanac Coal Co.*, 293 NLRB 290, 290 (1989)(finding no common ownership despite alleged alter egos being owned by brothers; *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435 (2004), enfd. 408 F.3d 450 (8th Cir. 2005).

¹⁶ *US Reinforcing*, supra, 350 NLRB at 407.

¹⁷ The General Counsel asserts that Moloney’s signature below Jackson’s as guarantor for BHE’s purchases from an electrical supplier and his signing a performance bond with Jackson indicates ownership in BHE. Moloney explained that his signatures were required because Jackson was new and unknown in the industry. This testimony is unrebutted and I credit it. Moreover, these two signatures are insufficient to show financial control of BHE.

¹⁸ *AC Electric*, 333 NLRB 987, 1001 (2001), enfd. sub nom. *ECM Enterprises v. NLRB*, 63 Fed.Appx. 521 (D.C. Cir. 2003).

¹⁹ Cf. *Diverse Steel, Inc.*, 349 NLRB 946, 947 (2007), finding one of the reasons for formation of a second company was to evade responsibilities under the Act as shown by owner statement that they did not get “money’s worth” from the union, company accountant statement that first company would be better off if it went nonunion, owner statement that he would have to open shop if he could not get better terms from the union, and statement of his wife, who formed second company, that second company formed because she could not convince her husband to take the first company nonunion.

Insufficient Evidence of Substantially Identical Management and Supervision

Moloney was the sole manager and supervisor for DCE. His wife was not involved in active management or supervision of DCE. Moloney handled all financial matters and estimated and submitted bids. Although Moloney did not work with the tools at DCE, he was the only supervisor for all projects. Jackson, whose testimony I credit, is one of three managers of BHE. Jackson handles all financial matters including payroll.

The General Counsel argues that Jackson’s duties are purely administrative. Further, the General Counsel notes that Jackson still retains a fulltime job elsewhere. Accordingly, the General Counsel requests that I find that Jackson does not manage BHE. Such a finding is not supported by the record. Although Jackson does not estimate or submit bids, her guidance regarding the nature of the business is referred to in the record. Thus, I find that she is the manager of BHE. Similarly, there is a total lack of evidence that Moloney has any management duties with BHE.

Moloney and Hillman bid for work on behalf of BHE. Moloney and Hillman also perform work on the jobsites and constitute the only supervisors for BHE. These facts do not establish exact identity of supervision but to the extent Moloney is involved, the supervision of his work is identical. Thus, the portion of work handled by Moloney has substantially identical supervision. The portion of work performed by Hillman’s crews has substantially different supervision. Management of the two entities is also different. On balance, therefore, I find insufficient evidence to conclude that supervision and management are substantially identical.

Substantially Identical General Business Purpose and Operations

Both DCE and BHE are electrical contractors. Throughout the relevant period, DCE handled public works and private construction electrical projects. It did not perform design build projects and it subcontracted data networking jobs. BHE performs design build and data networking jobs as well as public and private projects.

Counsel for the General Counsel argues that these facts are sufficient to show substantially identical business purpose citing *Kodiak Electric*, 336 NLRB 1038 (2001)(company performing “inside” electrical work and the other performing “outside” electrical work held alter egos).

On the other hand, Respondents claim the specific purpose of the two companies is different. Respondents note that 45 percent of DCE’s work was prevailing wage or public works while only 21 percent of BHE’s is prevailing wage or public works. Respondents also argue that BHE’s performance of design build, residential, and data networking differentiates it from DCE. Respondents rely on *Carpenters Local 745 (SC Pacific)*, 312 NLRB 903, 913 (1993), in which the Board affirmed the judge’s finding that two companies owned by members of the same two families were not alter egos where one company worked exclusively in new commercial, industrial, and government construction and large commercial, industrial, and government renovation while the other performed residential building and renovation. These markets only marginally overlapped. Thus, the finding was that there was not substantial identity of business purpose and operations.

On balance, I find no significant difference in general business purpose. Both companies perform electrical work in the construction industry and their markets significantly overlap. There was very little overlap in *Carpenters Local 745*, supra, the case relied upon by Respondents and I find that it is inapposite. There is thus substantial identity in their business purpose and operations.

Lack of Substantially Identical Equipment

DCE and BHE operated from different facilities, both located in Tumwater, Washington. They used different telephone numbers but during the first 9 months of BHE's existence, the same accounting company. After reconsidering the initial gifting of some of DCE's vehicles and equipment to BHE, BHE purchased three of six of DCE's vehicles and since then purchased two more vehicles from other sources. BHE also purchased some of DCE's tools and equipment. The prices for vehicles, tools, and equipment were set by Moloney after researching comparable prices online and at auction. BHE purchased other tools and equipment from sources unrelated to DCE.

Counsel for the General Counsel views the vehicle and equipment transactions as lacking in arms' length noting the initial gifting and then conversion to payment on a "lax" payment plan. Respondents argue that BHE paid fair market value for the three DCE vehicles and for the DCE equipment. In agreement with Respondents, I find that the companies do not have substantially identical equipment. Had the gifting of six vehicles and the equipment remained in place, there would be a stronger argument for substantially identical equipment. However, there is no evidence that when DCE decided to sell the equipment and vehicles to BHE, less than fair market value was determined. Further, BHE obtained vehicles and equipment from sources other than DCE. Two of its five vehicles were purchased from unrelated entities. The payment timing of about one year does not indicate less than an arm's-length transaction. Thus, I find insufficient evidence of substantially identical equipment.

Lack of Substantially Identical Customers in Common

Both BHE and DCE performed most of their work in the same geographic area. Twenty-one customers were served both by DCE and BHE. These customers in common represented 50 percent of DCE's projects and 60 percent of its sales while these same customers represented 28 percent of BHE's transactions and 30 percent of its sales. In my view, this is insufficient to show substantial identity of customers.

Conclusion

Having considered the factors above, I find insufficient evidence of an alter ego relationship between DCE and BHE. The record reveals that there is no substantially identical ownership, management, supervision, equipment, and customers nor is there evidence of a purpose to evade responsibilities under the Act. "Simply put, too many of the critical factors

traditionally relied upon by the Board to support alter ego findings are absent here.”²⁰ Thus, I find no violation of the Act by failure to apply the terms of the NECA/IBEW contract.

CONCLUSIONS OF LAW

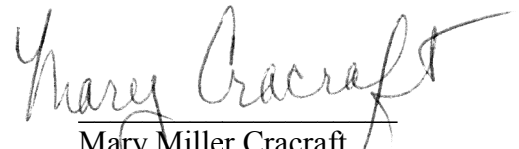
1. Respondents Deer Creek Electric, Inc. and Black Hills Electric, Inc. are employers within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local 76, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.
3. The Board has jurisdiction of this dispute pursuant to Section 10(a) of the Act.
4. There is insufficient evidence upon which to find that Respondents are alter egos and, accordingly, Respondents did not violate Section 8(a)(5) and (1) of the Act by failing to apply the terms of the NECA/IBEW contract to employees of Black Hills Electric, Inc.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:²¹

ORDER

It is recommended that the complaint be dismissed in its entirety.

Dated, Washington, D.C. May 1, 2014


Mary Miller Cracraft
Administrative Law Judge

²⁰ *DuPont Dow Elastomers LLC*, 332 NLRB 1071, 1084 (2000), *enfd.* 296 F.3d 495 (6th Cir. 2002).

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.